In the Supreme Court of the United States.

OCTOBER TERM, 1904.

Number 175.

GEORGE SCHLOSSER, PLAINTIFF IN ERROR,

vs.

W. L. HEMPHILL, RICHARD RYAN AND PALO ALTO COUNTY, IOWA, DEFENDANTS.

ON MOTION OF DEFENDANTS IN ERROR TO DISMISS.

REPLY OF DEFENDANTS IN ERROR.

Believing that certain features of the brief of the plaintiff in error is misleading and not proper for consideration in the motion to dismiss, the indulgence of the court is asked to the end that the defendants in error may file and have considered in connection with their motion to dismiss this:

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

The learned counsel for the plaintiff in error contends that a proper construction of the survey and patents to Anthony, the plaintiff's remote grantor would give riparian rights along Mud Lake, covering the land in dispute.

Counsel loses sight of the fact that the Supreme Court of Iowa found as a fact that the so-called Mud Lake was not a lake, never had been a lake and was swamp and overflowed land, thus bringing this case directly within the reason assigned in defendants in error's motion to dismiss, that is to say, if any federal question was raised in the pleadings or proceedings in the Supreme Court of Iowa, there was also raised and decided in that court a question of fact which made it wholly un-

necessary for the Supreme Court of Iowa to construe any federal question.

We take it as well settled that where a party aggrieved by a decision of the Supreme Court of a state sues out a writ of error to the Supreme Court of the United States and seeks to reverse the decision of the state court upon the ground that the decision of such court on questions of fact was erroneous and contrary to the weight of the evidence in the case, that this court will not assume or take jurisdiction of such question, and this is true however erroneous the decission of the state court as to fact may be. The learned counsel for the plaintiff in error seems to be especially aggrieved at the finding of the state court on the question as to whether there was in fact a lake of water upon or adjacent to the land in controversy. He has therefore set out in his brief a considerable portion of the evidence before the Supreme Court of Iowa including the length of time that various witnesses had known and been acquainted with the land in controversy, suggesting that there was no evidence as to the depth of the waters of the so-called Mud Lake at the time of the government survey in 1855, and calling attention to other evidence in the case. All of this evidence was before the Supreme Court of Iowa and was considered by that court and after giving it the weight and credit they deemed it entitled to, the unanimous decision of the court was that the land was swamp land and that there was no body of water upon which to base the meander line. The question the Supreme Court had to decide was as stated in their opinion "whether there was a body of water upon section 30 proper to be meandered. * * We do not intend setting out the testimony on this point. * * From a careful reading of it we reach the conclusion there was no such body of water." What did the Supreme Court decide, a federal question? No. A question of fact. Was it a lake of

water or was it swamp land? The Supreme Court of Iowa says "That there was swampy and low land on Section 30, north of plaintiff's lots, admits of no question and in wet seasons doubtless a large part of it was covered at times with water, but we are equally clear that no permanent body of water of any considerable extent existed there."

Counsel also cites the case of *Schlosser vs. Crookshank*, 96 Ia. 414, as supporting his contention that there was a lake of water upon the land in controversy upon which to base the meander line of the lots owned by the plaintiff in error. It is true that the land in controversy was the same land that was in controversy in the case of *Schlosser vs. Crookshank*, and it is true that in the former case the Supreme Court of Iowa decided in favor of the plaintiff, holding that he was riparian owner, but that case was decided in the erroneous belief by the Supreme Court of Iowa that the lake which they held in in the case of *Schlosser vs. Crookshank* was the basis for the meander line of plaintiff's lots, was Lost Island Lake, a lake two miles wide, three miles long and 20 feet deep, but they now find, and the truth is, that that lake lies south of Section 30 and does not touch plaintiff's lots at any point. This fact clearly appears in the decision of the Supreme Court of Iowa in the case at bar.

Page 127 of record.

Should the plaintiff in error be successful in this case he obtains title to 320 acres of land, or an entire half section, instead of 99 and 80-100 acres of land, the amount included in his patent from the government of the United States. Counsel for plaintiff in error in his brief claims that the patent under which plaintiff claims title conveys his fractional lots, according to the official plat of the survey of the said land returned to the General Land office by the surveyor

general. The description of the land embraced in the patent under which plaintiff claims title was as follows: "Lots No. 2 and 3 of Section 30, in Township 97 of Range 34 in the district of land subject to sale at Sioux City, Iowa, containing 99 acres and 80-100 of an acre, according to the official plat of the survey of the said land returned to the general land office by the surveyor general." The patent also discloses that it was issued to John A. Anthony, under the homestead law; it being within the railroad limits, Anthony could only enter 80 acres of land under the homestead law and must therefore pay the government price for the excess over 80 acres of land. Had Anthony been attempting to enter under the homestead law one-half of the land his grantee now seeks to obtain title to by virtue of Anthony's homestead entry, no patent would ever have issued because he legally could only enter 80 acres of land and he could legally pay excess on less than the smallest subdivision or upon less than 40 acres of land. In other words, he would not have been permitted under the law to enter 120 acres of land within the railroad limits. What significance does the words "Containing 99 acres and 80-100 of an acre according to the original plat of the survey of said land" have? Simply to determine the amount of land that should be paid for under the entry of Anthony, a statement which appears in every patent issued by the government. The plaintiff in error claims to own the 99 and 80-100 acres embraced in his patent, claims it under a statute of the United States by virtue of a patent and survey. His claim is conceded. The decision of the Supreme Court of the state of Iowa recognizes it. He also claims 220 and 20-100 acres more land than is described in his patent. He claims this 220 and 20-100 acres of land as a riparian owner. It is well established by the decisions of this court that the legal question as to whether one is entitled to land as a ripar-

ian owner or has a riparian right depends upon the law of the state wherein the claim is asserted. The principle is so well established as to need no citations. The law of the state of Iowa holds that a man owning land on a water course owns the land to the high water mark, but the Supreme Court of Iowa was unable to pass upon the question of riparian rights in this case and to apply the law of the state of Iowa to it, either under the theory of accretions, relictions or land laying between the meander line and the water course for the reason that they found as a matter of fact, there was no water course, there was no lake, but lying out and beyond the meander line of the lots of the plaintiff in error was other lands, some of it dry lands, and embraced in the homestead entry of the defendant in error, Ryan, some of it wet lands which had been patented to the state of Iowa as swamp and overflowed lands. This finding of the Supreme Court of Iowa precludes the possibility of the construction of any federal statute under the records of this case. In this connection we call attention to the decision of this court in the case of

Dower vs. Richards, 151 U. S. 658.

The case last cited was an action involving the validity of a town site patent issued under the laws of the United States pertaining to town sites as against the validity of a claim asserted under the mining laws of the United States. The decision of the Supreme Court of the state of California was in favor of the town site patent. A writ of error brought the case to the Supreme Court of the United States. The proposition of law upon which the plaintiff in error asked relief was, *when a quartz ledge is known to be gold bearing and to have been profitably worked prior to the acquisition of a town site patent, it is accepted and excluded from such patent.* The Supreme Court of the state of California did not deny this proposition of law,

but found as a fact that the quartz ledge was not known of at the time of the issuance of the town site patent and therefore the town site patent included the land there in controversy. This court in its decision said "from the foregoing reasons and authorities it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge at the time when the town site patent took effect was known to be valuable for mining purposes."

Again in the language of Justice Story this court has said: "We have no authority as an appellate court upon a writ of error to revise the evidence in the court below in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it."

In the case of *Dower vs. Richards* above cited, numerous decisions are referred to which decisions we believe fairly and clearly establish the rule that the only consideration the Supreme Court of the United States will give to the finding of facts of a state supreme court is where such a court, after having determined the facts, then applies those facts and the rights accruing under such facts to a federal question. In other words where such a court applying the facts as found gives a legal interpretation to rights under the constitution or laws of the United States, then a federal question has been raised, but where as in the case at bar the state Supreme Court finds and determines a fact which precludes an application of any federel question, that the Supreme Court of the United States is without jurisdiction to inquire into such decision. We quote from the decision of the Supreme Court of the United States in the case of *Dower vs. Richards*:

"Such a writ of error can be sustained only when the decision of the state court is against a right claimed under the Constitution and laws of the United States." *Montgomery vs.*

Hernandez, 25 U. S. 12 Wheat. 129 (6:575); *Missouri vs. Andriano*, 138 U. S. 496 (34:1012.)

"And if the decision of the state court rests on an independent ground of law, not involving any Federal question, this court has no jurisdiction." *New Orleans Water Works Co. vs. Louisiana Sugar Ref. Co.* 125 U. S. 18 (31:607); *Eustis vs. Bolles*, 150 U. S. 361 (37:1111); *California Powder Works vs. Davis, ante*, P. 206. "The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only.

"When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: 'The powers of the Supreme Court are limited in cases coming up from the state courts, under the 25th section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authoritty exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an Act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed in a similar manner as if a like question had arisen in a Su-

preme Court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction." *Mackay vs Dillon*, 45 U. S. 4 How. 421, 447 (11:1038, 1050).

151 U. S. 308.

"In *California Powder Works vs. Davis*, ante, P. 206, in which each party to a suit to quiet title claimed title under a patent from the United States confirming a Mexican grant, and the judgment of the supreme court of California rested on the proposition of fact that the grant under which the plaintiff in error deraived titlé was simulated and fraudulent, this court dismissed the writ of error for want of jurisdiction.

"The case now before us is an action of ejectment, which was submitted to the supreme court of the same state, according to the local practice upon findings of fact and a statement of evidence by an inferior court of the state. From the foregoing reasons and authorities, it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town site patent took effect, was known to be valuable for mining purpose; and the only question of Federal law in the case having been rightly decided by that court, its judgment is affirmed."

It would thus seem that when the Supreme Court of Iowa has decided that upon the evidence in this case there was no body of water upon which to base the meander lines as run by the government surveyor that that fact precludes any possible claim or contention of the application of a federal question.

Counsel for plaintiff in error cites the case of *French Glenn Live Stock Company vs. Springer*, being a case considered by the Supreme Court of the United States upon writ of error to the Supreme Court of the state of Oregon as conclusive of his proposition that a federal question is shown by the records in

the case at bar. An examination of this authority discloses the fact that the question of jurisdiction was not raised in that case except as suggested by Mr. Justice Shiras in the opinion, which suggestion was as follows:

"As the case went off in the Oregon Courts on this question of fact it may be questionable whether any matter of federal law is left open for our revision."

There is one important distinction between the Oregon case and the case at bar. In the Oregon case there was no question but what there was a lake lying out and beyond the meander line, the only question being its relative position to the lots bordering upon the meander line. The plaintiff in error was contending that under these facts a proper construction of the plats and patent under which it obtained title would give it the land in controversy. While in the case at bar the Supreme Court of Iowa has determined that there was in fact no lake of water upon which to base the meander lines bordering on plaintiff's lot; that lying out and beyond this meander line was nothing but land, some dry land and some swamp land; consequently no possible construction of a federal question was made by the Supreme Court of Iowa. We do not deem that the other authorities cited by counsel require comment.

Respectfully submitted,

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